

September 10, 2007

Mr. Peter Diakos
P.O. Box 407
Cheswold, DE 19904

Re: **Freedom of Information Act Complaint
Against Town of Cheswold**

Dear Mr. Diakos:

On June 18, 2007, our Office received your complaint alleging that the Town of Cheswold ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), by meeting in executive session on June 14, 2007 to discuss a "Personnel Matter," *i.e.*, "the removal of Anna Strimel as a member of the Cheswold Planning Commission." You allege that "[w]hen the Council reconvened in public they voted to remove Ms. Strimel as a member of the Planning Commission." You allege that the Council violated the public notice requirements of FOIA because the agenda for the meeting "never mentioned they were going to discuss a member of the Planning Commission or the firing of a person in that volunteer position."

¹ You provided us with a copy of the agenda for the June 14, 2007 which listed for discussion "Executive Session if needed to discuss personnel matters."

¹ You also allege that the Town violated Section 701 of Title 22 of the *Delaware Code* which provides: "Any member of the planning commission so established in a city may be removed for cause after a public hearing by the mayor with the approval of city council." Whether or not Ms. Strimel received a public hearing before her removal is an issue of municipal law which is outside our jurisdiction under FOIA.

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By letter dated June 19, 2007, our Office asked the Town to respond in writing to your complaint by July 2, 2007. We received the Town's response by facsimile on June 21, 2007.

According to the Town, the "Council voted in public to enter executive session to discuss personnel issues related to Ms. Strimel's appointment on the Planning Commission. After moving out of executive session, the Council voted to remove Strimel from the Planning Commission." The Town contends that the "Council properly notified the public that it would discuss personnel issues during executive session" because "FOIA does not require the agenda to 'specify what legal, personnel or other subjects are discussed in executive session'" (quoting *Att'y Gen. Op.* 03-IB12 (May 21, 2003)).

By letter dated June 25, 2007, our Office asked for a copy of the minutes of the June 14, 2007 executive session for our *in camera* review. After a reminder letter on July 12, 2007, our Office received the executive session minutes on July 18, 2007.

RELEVANT STATUTES

FOIA requires public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda, . . . and the dates, times and places of such meetings." 29 *Del. C.* §10004(e)(2).

FOIA authorizes a public body to meet in executive session to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed, unless the employee or student requests that such a meeting be open." 29 *Del. C.* §10004(b)(9).

FOIA defines an agenda as "a general statement of the major issues expected to be discussed

at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor . . ." *Id.* §10002(a).

LEGAL AUTHORITY

"‘An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their concerns or ideas.’" *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

The notice requirements for executive session, however, are less stringent because the executive session is closed to the public. FOIA "simply requires public bodies to disclose the purpose of the executive sessions in the agenda." *Common Cause of Delaware, Inc. v. Red Clay Consolidated School District*, C.A. No. 13798, 1998 WL 733401, at p.4 (Del. Ch., Dec. 5, 1998) (Balick, V.C.). Our Office has determined that FOIA does not require a public body to "specify what legal, personnel or other subjects are discussed in executive session." *Att’y Gen. Op.* 02-IB12 (May 21, 2002) ("Executive Session to Discuss Personnel" satisfied the agenda requirements of FOIA"). *See also Att’y Gen. Op.* 03-IB20 (Sept. 3, 2003); *Att’y Gen. Op.* 99-IB03 (Apr. 28, 1999) (town could meet in executive session to discuss candidates for town manager; FOIA does not require disclosure in the agenda of the names of job applicants).

Our Office determines that the Town satisfied the public notice requirements of FOIA by listing in the agenda for the June 14, 2007 meeting that the Council would meet in executive session to discuss a personnel matter. FOIA did not require the Town to identify the person by name who would be the subject for discussion at that executive session.

The minutes of the June 14, 2007 meeting reflect that the Council voted in public session to go into executive session to discuss a personnel matter. The minutes of the executive session (which began at 7:58 p.m.) reflect that the Council discussed "the Strimel situation. The Council discussed the letter from Ms. Hurley and Ms. Strimel's refusal to meet with Council to discuss the situation." The minutes of the executive session then reflect that at 8:18 p.m. the Council voted to go back into public session, at which time the Council voted to remove Ms. Strimel from the Planning Commission.

Our Office determines that the Council met in executive session for a purpose authorized by law: to discuss "[p]ersonnel matters in which the names, competency and abilities of individual employees or students are discussed." 29 *Del. C.* §10004(b)(9). The Council also complied with FOIA by returning to public session to vote. "Executive sessions may be held only for the discussion of public business, and all voting on public business must take place at a public meeting and the results of the vote made public." *Id.* §10004(c).

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CONCLUSION

For the foregoing reasons, our Office determines that the Town did not violate the public notice requirements of FOIA. The agenda for the June 14, 2007 Town Council meeting satisfied the notice requirements of FOIA by stating the purpose of the executive session listed in the agenda: to discuss a personnel matter. FOIA did not require the Council to name the person in the agenda who was to be the subject of that private discussion.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
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